

## Federal Communications Commission

FCC 95R-15

FCC MAIL SECTION

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Federal Communications Commission  
Washington, D.C. 20554

DISC 10 10 42 AM '95

CC Docket No. 94-89

In the Matter of

Elehue Kawika Freemon and  
Lucille K. Freemon,  
Complainants,

File No. E-90-393

v.

American Telephone and Telegraph  
Company,  
Defendant.

## Appearances

Elehue K. Freemon, *Pro Se*; and Mark C. Rosenblum,  
Peter H. Jacoby, and Clifford K. Williams, on behalf of  
AT&T.

## DECISION

Adopted: July 21, 1995;

Released: August 8, 1995

By the Review Board: MARINO (Chairman) and  
GREENE.

Board Member GREENE:

1. The Review Board has before it for consideration a pleading styled "Motion for Appeal," filed March 24, 1995, by Elehue Kawika Freemon, which is in the nature of exceptions to the *Initial Decision*, 10 FCC Rcd 2157 (1995), (*I.D.*) of Administrative Law Judge Walter C. Miller (ALJ), which dismissed the above-captioned Section 208 complaint for monetary damages from AT&T Corp. (AT&T).<sup>1</sup> AT&T also filed limited exceptions, a reply, and a request for oral argument. We will deny AT&T's request for oral argument because it does not appear that oral argument would lend valuable assistance in resolving the issues before us. See *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 ¶ 46 (1990). We adopt the ALJ's find-

ings of fact, affirm his dismissal of that portion of the complaint attributable to Lucille Freemon, and deny Elehue Freemon's complaint for failure of proof.

2. The crux of Freemon's complaint is an allegation that an AT&T operator handling Elehue Freemon's collect telephone call to his mother, Lucille K. Freemon, on May 30, 1988, violated Section 705 of the Communications Act of 1934, as amended, 47 U.S.C. § 605, by listening in on their eight-minute conversation, interrupting to ask Mrs. Freemon whether her son needed medical help, and divulging the contents of his call by forwarding it to the local emergency services agency and advising them that an emergency may exist with the caller. See *Hearing Designation Order*, 9 FCC Rcd 4032 (1994) (*HDO*). Section 705 (a) provides in pertinent part:

Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof. . . .

The chapter 119 exception noted above permits a switchboard operator "to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service ...." 18 U.S.C. § 2511 (2)(a)(i). The instant proceeding also seeks to determine whether the Freemons suffered any measurable harm as a consequence of a violation of Section 705 and are entitled to an award for damages under Section 207. *HDO*, 9 FCC Rcd at 4032 ¶ 1.

3. The issues specified are:

1. To determine the facts and circumstances surrounding AT&T's handling of Elehue Freemon's operator-assisted telephone call to his mother, Lucille Freemon, on May 30, 1988.
2. To determine whether a telephone conversation ensued between Elehue Freemon and Lucille Freemon on May 30, 1988, at the time an AT&T operator handled the operator-assisted call at issue.
3. To determine whether AT&T, through its operator or otherwise, intercepted and disclosed the contents or meaning of any telephone conversation that may have taken place between Elehue Freemon and Lucille Freemon on May 30, 1988, within the meaning of Section 705 of the Communications Act.

<sup>1</sup> The caption of the *Hearing Designation Order* lists American Telephone and Telegraph Company as the defendant. Following the filing of the complaint, the defendant changed its name to AT&T Corp. The term AT&T herein means AT&T Corp. and its predecessor American Telephone and Telegraph Company. See Appendix A item B (Definitions) of Defendants First Request for Production of Documents by Complainant Lucille K. Freemon, filed September 9, 1994 by AT&T.

Section 208 of the Communications Act, 47 USC § 208, provides that a complaint may be filed with the Commission alleging any violation of the Act by a common carrier, and Section 207, 47 USC § 207, permits a recovery for damages to be included in that complaint.

4. To determine, in light of the evidence adduced under issues 1 through 3 above, whether AT&T's actions in handling Elehue Freemon's May 30, 1988 operator-assisted call violated Section 705 of the Communications Act.

5. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, AT&T should be required to pay monetary damages to complainants.

6. To determine, in view of the evidence adduced on the foregoing issues, whether complainants are entitled to an award of prejudgment interest on any damages recovered in this proceeding.

*Id.* at 4034. Both the burden of proof and the burden of proceeding with the introduction of evidence were placed on the complainants. *Id.*

4. Initially, the ALJ dismissed all portions of the complaint attributable to Mrs. Freemon. *I.D.* at ¶ 12.<sup>2</sup> Her Notice of Appearance, the filing of which was a prerequisite under 47 CFR § 1.221 to her right to be heard, was concededly signed and filed by Mr. Freemon rather than Mrs. Freemon (Tr. 4);<sup>3</sup> and she subsequently testified, by deposition, that her son was prosecuting the action alone. Judge's Exh. 1 at 33-34. She also indicated at that time that she thought her son's dispute with the telephone company was over, *id.* at 35-36, 54-55; and when asked by the ALJ at the prehearing conference held November 10, 1994, as to whether Mrs. Freemon was still a complainant, Mr. Freemon replied: "As far as I know, at this stage she is not." Tr. 12. Mr. Freemon's Appeal further corroborates that Mrs. Freemon is not a present complainant in the case. Br. at pp. 12-13 ¶ ¶ 82-83. These circumstances considered, the ALJ's ruling dismissing all portions of the complaint attributable to Mrs. Freemon as a complainant herein is affirmed.

5. The ALJ also dismissed the remainder of the complaint concluding that Mr. Freemon had filed a "sham suit against AT&T" which "should not be given serious consideration." *I.D.* at ¶ ¶ 11, 17. The basis for this holding was the ALJ's finding that Freemon had dishonestly included his mother as a co-complainant to enhance his chances for securing a large cash award from AT&T and then, when it subsequently appeared that she was a litigation liability rather than an asset, came up with the idea that she had Alzheimer's disease to discredit her testimony. *Id.* at ¶ ¶ 17-22. Alternatively, the ALJ held that, assuming, *arguendo*, the complaint was not a sham, it would have to be denied because Freemon, who had burdens of both proceeding and proof, fell significantly short of meeting those burdens since three of Freemon's tendered exhibits were rejected; and, even if they had been admitted, they would not have established a nexus between the alleged injury and the monetary claims against AT&T. *Id.* at ¶ ¶ 24, 26; Tr. 114. Finally, although observing that findings of fact or law are superfluous in light of the above determinations, the ALJ, nonetheless, made such findings on the designated issues, citing as cause the protracted length of

time the matter has been pending and AT&T's position that the matter should be decided on the merits. *I.D.* at ¶ ¶ 27-28. The ALJ's pertinent findings and conclusions follow.

6. On May 30, 1988, at approximately 10:30 p.m., Mr. Freemon attempted to place a long distance collect call from his home in Gresham, Oregon, to his mother in Long Beach, California. *Id.* at ¶ 29. Prior to placing the call, Mr. Freemon had drunk at least three glasses of wine and had ingested an indeterminate number of sleeping pills. *Id.* According to the long distance operator, Nancy Zolnikov, Mr. Freemon was breathing heavily, his speech was confused and disoriented, and he was experiencing difficulty in identifying the party he desired to reach, stating to the operator he wanted to speak with "Mom." *Id.* at ¶ ¶ 30-31. After reaching Mrs. Freemon and announcing that Mr. Freemon was trying to place a collect call, Ms. Zolnikov advised Mrs. Freemon that her son appeared to need medical assistance. *Id.* at ¶ 32. Mrs. Freemon gave the operator Mr. Freemon's full name and authorized Ms. Zolnikov to seek medical assistance for her son. *Id.* Ms. Zolnikov routed the call to the Oregon Emergency Services in Portland, Oregon, which independently determined to send the police to Mr. Freemon's residence. *Id.* at ¶ 33. The ALJ concluded that Ms. Zolnikov's judgment had been accurate and that a medical emergency did exist because Mr. Freemon was contemplating suicide. *Id.* at ¶ 40. Mr. Freemon was thereafter involuntarily hospitalized in a Police Officer Mental Hold for his own safety for four days following the purported suicide attempt.

7. Based on his findings, the ALJ held that: (a) no conversation had ensued between Elehue Freemon and his mother at the time the AT&T operator handled the operator-assisted call; (b) there was no interception or improper divulgence by the AT&T operator, Nancy Zolnikov; (c) Zolnikov did not violate Section 705 of the Communications Act, and forwarded the call to emergency agency as a necessary incident to the rendition of AT&T's service; and (d) the complainants are not entitled to damages or any prejudgment interest. *Id.* at ¶ ¶ 34-42. He added that even if AT&T had violated Section 705, the complainants could not prevail because they did not meet their burdens of proceeding or proof, or even seriously attempt to address those burdens. *Id.* at ¶ 41.

8. In its limited exceptions, AT&T supports the findings and conclusions of the *I.D.*, but contends that the *I.D.* should have dismissed the complaint because Section 705 of the Act is not applicable to wireline calls; and, furthermore, the claim was untimely and thus barred by Section 415 of the Communications Act prescribing the statute of limitations. Additionally, it argues that the conduct complained of is contrary to AT&T corporate policies and therefore cannot serve as a basis for liability against the corporation. We need not reach these exceptions. First, the Board has no authority to dismiss an *HDO* issued by the Commission or under delegated authority as defective on its face. See *Frank H. Yemm*, 39 RR 2d 1657, 1659 ¶ ¶ 3, 6-7 (1977). Second, the exceptions concerning the propriety of the *HDO* are not decisional since we are denying Freemon's complaint for failure of proof. It is also unrec-

<sup>2</sup> The complaint includes an affidavit ostensibly signed by Mrs. Freemon in which she alleges that she told the operator she "did not want the police" at her son's residence. Freemon Exh. 1 at p. 12-13. The ALJ found, however, that the allegations

contained in the affidavit were actually Elehue Freemon's rather than his mother's and that she did not bring or ever intend to bring a complaint against AT&T. *I.D.* at ¶ 12 & n.9.

<sup>3</sup> The ALJ found that Freemon had forged his mother's Notice of Appearance. *I.D.* at ¶ 13.

essary to decide whether the conduct complained of is contrary to AT&T's corporate policies, for the record is void of any evidence of wrongdoing by operator Nancy Zolnikov.

9. In the appeal, Freemon charges initially that the ALJ was biased in dismissing the complaint, that the ALJ intended "to railroad this case into a dismissal by systematically discrediting the complainants by whatever means at his disposal," and that he should have recused himself from the case. Br. at pp. 4-7 ¶¶ 26, 30-41, 9 ¶ 59, 15 ¶ 96, 19 ¶ 153. Freemon further contends that the ALJ erred: (a) by failing to demonstrate a "heightened duty" to Freemon because of Freemon's prosecution of the case without assistance of legal counsel, *id.* at p. 11 ¶ 70; (b) by not accepting Mrs. Freemon's medical reports into evidence, *id.*; see also pp. 4-5 ¶ 27; (c) by rejecting from evidence Freemon Exh. 2, which includes, *inter alia*, a copy of the 911 telephone transcript of the May 30 emergency call released by the Portland, Oregon Bureau of Emergency Communications, *id.* at pp. 5 ¶ 28, 13 ¶ 87; and (d) by rejecting Freemon's own hospital records from evidence. *Id.* at pp. 9-11 ¶¶ 61-62, 67-68.

10. Freemon argues that a "heightened duty" and acceptance of his mother's medical reports would have avoided the ALJ's adverse character findings that Freemon dishonestly included his mother as a co-complainant, knowing she had no intention to become a party, and raised her mental disability only because he became aware she was a litigation liability rather than an asset. *Id.* at pp. 11-12 ¶¶ 71, 77. Additionally, he asserts that his mother's reports would have demonstrated that she has had Alzheimer's over a period of years, which taints the credibility of her deposition. *Id.* at p. 9 ¶ 53. Freemon also argues that the 911 telephone transcript demonstrates that he and his mother conversed after the operator announced to his mother that he was trying to place a collect call. *Id.* at pp. 16-18 ¶¶ 113, 146-147. Finally, Freemon claims that his hospital records would have shown that he had no drugs in his system and that he had not been in immediate danger when transported to the hospital the night of the call. *Id.* at pp. 10-11 ¶¶ 62, 64, 68.

11. Initially, we will strike Freemon's exceptions alleging bias. We have recently had occasion to remark:

[w]here an applicant [or in this case, a complainant] fails to utilize the specified procedures provided by the Commission in Section 1.245 of its Rules, 47 CFR § 1.245, governing disqualification of a presiding ALJ, but nonetheless raises the matter of bias in its brief and exceptions for the first time, the Board's general practice is to strike those exceptions that seek through the back door to cast serious aspersions on the integrity of the presiding ALJ with

undocumented maledictions in a forum in which the ALJ cannot respond.' *Aspen FM, Inc.*, 5 FCC 3196 at ¶ 4 (Rev. Bd. 1990).

*Maria M. Ochoa*, 10 FCC Rcd 4323, 4324 ¶ 9 (Rev. Bd. 1995). In *Ochoa*, as here, we struck the exceptions alleging bias. As requested by Freemon, however, see Br. at pp. 19 ¶ 153, 21 ¶ 163, we have reviewed the record with special care and due deliberation. See *Ochoa*, at ¶ 9 and cases cited therein.<sup>4</sup>

12. Freemon's remaining exceptions are without merit and provide no basis for overturning the *I.D.* First, although Freemon is correct that a *pro se* complaint, however inartfully pleaded, must be examined to ascertain "whether any possibility exists that the [complainant] could prove a set of facts in support of his claim that would entitle him to relief," *Martin-Trigona v. Smith*, 712 F. 2d 1421, 1424 (D.C. Cir. 1983); see also *Mandeville Broadcasting Corp.*, 2 FCC Rcd 2523 (1987) ("rambling and confused pleadings of litigious *pro se* parties are entitled to patient and reasoned analysis and decision"), a review of the evidentiary record and proffered materials establishes that the ALJ was conscientious in compiling the best available evidentiary record and that he examined all of the material proffered by Freemon to ascertain whether a claim entitled to relief had been presented. The ALJ even took the extraordinary step of admitting into evidence as "Judge's Exhibits" the depositions of all of the major principals involved in the disputed events including Mr. Freemon, Mrs. Freemon, and Ms. Zolnikov. See Tr. 156, 173-74; Order, FCC 94M-641, released December 13, 1994. He also attempted in his *Prehearing Order*, FCC 94M-482 (corrected), released August 19, 1994, to assist the parties in identifying the specific evidentiary items necessary to resolve the complaint. He advised Freemon from the outset on the need to retain a trial attorney rather than to represent himself. *Prehearing Order*, *supra*; *Memorandum Opinion and Order*, FCC 94M-550, released September 28, 1994. And, he retained Freemon's rejected written exhibits in the record as an offer of proof. Tr. 174.

13. Second, the ALJ did not abuse his discretion in rejecting Mrs. Freemon's medical reports. A presiding ALJ has "broad authority to regulate the course of the hearing, particularly with respect to ... evidentiary matters." *Metropolitan Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987). The reports, which are now attached to Freemon's Appeal as "Exhibit 4," consist of correspondence in 1991 between physicians relating to an initial consultation with Mrs. Freemon concerning memory loss, and an additional letter dated November 23, 1994, from a physician stating that he is treating Mrs. Freemon for hypertension and Alzheimer's and that she is disabled from going to Washington for a court appearance. They were not part of Freemon's direct affirmative case, which the ALJ ordered

<sup>4</sup> In connection with the bias charge, Freemon appended to his Appeal four exhibits, each of which is, for the main part, a statement of a family member or friend under a heading labelled "Request for Participation," that attempts to address the remark made by the ALJ that Mr. Freemon's complaint is a "sham." See *I.D.* at ¶ 17. The requests were purportedly filed pursuant to Section 1.225 (a) of the Commission's Rules, 47 CFR § 1.225 (a). The same exhibits were refiled separately from the Appeal at other dates. Section 1.225 (c), however, provides that "When a hearing is held, no communication will be considered in determining the merits of any matter unless it has

been received into evidence." None of the statements or other material accompanying the Requests for Participation was proffered or received into evidence. In any event, "recusal [of an ALJ] is required only where a 'disinterested observer may conclude that the [decisionmaker] has in some measure adjudged the facts as well as law of the particular case in advance of hearing it.'" *Metropolitan Council of NAACP Branches v. FCC*, 46 F. 3d 1154, 1164-1165 (D.C. Cir. 1995).

to be exchanged on November 10. See *Prehearing Order, supra*, at ¶¶ 14-18. Rather, they were first proffered to the ALJ and opposing AT&T counsel at the hearing on December 12, 1994. See Tr. 322-341. Freemon acknowledged he did not prepare the exhibit until there was a prospect that his mother might have to testify at hearing. Tr. 326-327. Mrs. Freemon had previously been deposed and given deposition testimony that conflicted with Mr. Freemon's version of the facts. The ALJ acted well within his discretion in rejecting the medical reports on the grounds they were too late and appeared to have been compiled by Freemon after the date for submission of direct cases. Tr. 337.

14. In any event, there is no record support to demonstrate that a "heightened duty" by the ALJ or acceptance of Mrs. Freemon's medical reports would have negated the ALJ's adverse findings regarding Mr. Freemon's character or tainted Mrs. Freemon's deposition. The ALJ enumerated questionable actions by Freemon to support his findings. See para. 5, *supra*, and nn.2-3. But whether we would draw the same inferences is not decisional since our affirmance of the *I.D.* rests on Mr. Freemon's failure of proof. See para. 21, *infra*. And as to the deposition, Freemon has not shown how the medical correspondence would have tainted Mrs. Freemon's credibility. Even allowing that Mrs. Freemon has suffered a significant degree of memory impairment, her deposition nevertheless appears to reflect that she possessed some memory of the incident and the trauma it caused her son, consistent with the other evidence discussed below. For example, when show a copy of the complaint, she responded:

A. I was wondering, I thought all of these things were over. My goodness, I can't believe this.

\*\*\*

A. Gosh, he has never gotten over it.

Judge's Exh. 1 at 54-55. When asked to read the factual allegations in the complaint, she responded:

Q. And you don't remember it occurring that way?

A. No. No. This is terrible.

\*\*\*

A. What's written on here is not the truth.

\*\*\*

Q. Right. Did it happen a different way, Mrs. Freemon? Do you remember getting a call from an operator who indicated that your son might be in trouble and then asked you for information about how to help him? Mrs. Freemon?

A. Yes, I know that.

\*\*\*

Q. Did you get a call from an operator on that day, and the operator asked you for information to try to help your son?

A. Yes.

Q. Is that the way it happened?

A. Oh, my God, what a mess.

\*\*\*

Q. Okay. Mrs. Freemon, if you could just go back, you said that what was in that paragraph was not true. Did something else happen? Did an AT&T operator call you and indicate to you that your son Elehue might be in trouble, and then ask you for help in order to get help for him? Is that what happened?

A. Right.

Q. Is that the way it happened?

A. Uh-huh (indicating yes).

Q. And --

A. That he needed help.

Q. And what did you say?

A. I didn't think he needed help, but I had to call because the way he was talking. I heard him talking, and I thought he was sick, but actually, he was all right.

Q. Okay. But at the time you thought he might be sick?

A. Uh-huh (indicating yes).

\*\*\*

Q. So did you tell the operator that it was okay for her to try to help your son?

A. I believe I did, yeah.

*Id.* at 71-73. It was Mr. Freemon's burden to show that his mother earlier had a different recollection of the call than that indicated at her deposition or that she was so incompetent to recall or observe that her deposition should be given no credibility here. The proffered medical information does not address her capacity to give credible evidence. Thus, the medical letters are to no avail to establish that her deposition is "tainted." Furthermore, her incompetence to recall accurately the information given in her deposition is not established by the tenor of her deposition testimony.

15. A second attempt to "taint" Mrs. Freemon's deposition, made in passing by Freemon, see Br. at p. 12 ¶ 80, is also to no avail. Freemon claims that a sequestration order, FCC 94M-557,<sup>5</sup> by the ALJ against him and his mother at deposition negatively affected his *pro se* representation of

<sup>5</sup> The Order bears a release date of August 30, but it appears that the correct date should be September 30, 1994.

the complaint during his mother's cross-examination. The ALJ issued the order because he suspected that Mrs. Freemon's Notice of Appearance may have been "forged" by Mr. Freemon. *Memorandum Opinion and Order*, 94M-529, released September 16, 1994 at n.l. And, at the time of the issuance of the sequestration order, both Mr. and Mrs. Freemon were captioned as complainants and Mr. Freemon had not informed the ALJ that Mrs. Freemon purportedly had Alzheimer's. Tr. 338-341. In light of the suspicious circumstances and Mr. Freemon's failure to timely inform the ALJ that his mother had Alzheimer's, the ALJ cannot be faulted for requiring the sequestration of the putative complainants at their depositions.

16. As to Freemon's third exception, even if we assume that we can take official notice of the 911 telephone transcript of the emergency call<sup>6</sup> and that it accurately reflects the conversation between the AT&T operator, Ms. Zolnikov, and the dispatcher of the Bureau of Emergency Communications, the transcript does not support Freemon's contention that the operator stayed on the line and monitored any conversation between him and Mrs. Freemon before interrupting and alerting the emergency service. The 911 transcript, which includes a notation "this is *not* verbatim transcript," reads:

M subj at this loc placed long distance call to mom in LA,,, then hung up ... Mom told operator to get help for her son, but did not have the address,,sed that he is strung out on drugs and needs help... No name for mom, but son is Eleue Freeman [sic]... Mom's phone [ ]... traces to above.. Rockwood/Gresham Gym\*\*\*C3 Amb and Fire Res Ordered.

Freemon Exh. 2 at pp. 10, 13 (rejected). Apparently, Freemon's argument is that Ms. Zolnikov and Mrs. Freemon never spoke of any drugs or alcohol and Ms. Zolnikov could only have learned about those facts from eavesdropping on the alleged conversation between Mr. Freemon and his mother. Br. at pp. 17-18 ¶¶ 138, 147. Additionally, Freemon refers to a part of Ms. Zolnikov's deposition where she responded to Mr. Freemon's questions by suggesting that a conversation did ensue. *Id.* at pp. 15-17 ¶¶ 101-134. Neither deponent could recall the details of their conversation and Ms. Zolnikov testified that at the time of her deposition her memory was impaired by heavy medication she was taking for cancer. See Judge's Exh. 1 at p. 71 and Exh. 3 at p. 8-10, 13-16. Their depositions, therefore, shed little light on the precise content of their conversation. However, in an Answer to the complaint, prepared by AT&T in 1990, which came prior to her prescription for cancer medication, Ms. Zolnikov verified that she had immediately told Mrs. Freemon when announcing the call that she believed a medical emergency existed and that Mrs. Freemon had told her to get medical

assistance for her son. *Id.* at 18 ; see also *id.* at Attach. exh. 3 pp. 7-8. Mrs. Freemon's deposition testimony is not inconsistent with this answer. See para. 14, *supra*.

17. Moreover, AT&T adduced the testimony of Thomas C. Sharpe, then responsible for AT&T's technical equipment in operation on the night of the call, who explained that the operational and transmission characteristics of that equipment would not have permitted an operator to stay on the line and interrupt a call between two parties without both parties being able to hear the operator's voice. AT&T Exh. B at p. 5. Here, Freemon stated at hearing that he was blanked out and did not hear anything the operator said to his mother about the emergency. Tr. 181-182. Mr. Sharpe explained:

When a party placing a collect call reached the AT&T operator position associated with a TSPS No. 1B [Traffic Service Position System], the operator would determine the call type and the name of the caller, and then advance the call to the called party to obtain call acceptance.

AT&T Exh. B at p.5. Sharpe continued:

After the transmission path was established and call acceptance obtained, in the ordinary course the operator would release the position and turn to processing other calls. If the operator did not release the position, it would have been possible in a TSPS environment for the operator to reenter the conversation at later points and to converse with either one of the parties. *However, because of the characteristics of the voice transmission path established by the TSPS, any such intercession by the operator would have been audible to both parties to the call.*

*Id.* at p. 6 (italics added).

18. In contrast to the evidence above, Freemon's testimony is the only evidence adduced by Freemon to establish that the operator had improperly eavesdropped on the call and contacted emergency services without eliciting either his or his mother's consent. Freemon attributed the heavy breathing and sniffing heard by the telephone operator to his having just completed a strenuous exercise on a trampoline in a cold room. Judge's Exh. 2 at p. 179 (Freemon resided in his gym). He also asserted that he had not had any physical or mental problems at the time he called his mother on the night of May 30, 1988. Tr. 246: denied that he had attempted suicide, Tr. 286, 289-293; and claimed there had been no emergency, Tr. 286. The police and psychological reports depict an altogether different picture and wholly refute his testimony. The Police Report, which includes a statement and supplement by the reporting officer, reads:

<sup>6</sup> A claim by Freemon that the 911 telephone transcript is already in the hearing record because it was part of a pre-designation pleading accepted by the Commission is incorrect. See Br. at p. 14 ¶¶ 93-94, p. 19 ¶ 153. Pleadings filed with the Commission must be introduced into evidence before they become part of the hearing record. See *Oliver Kelley and Mary Ann Kelley*, 7 FCC Rcd 4239 (1992) (interrogatory answers not proffered during the hearing or tested by the crucible of cross-

examination are not a part of the evidence in the case); *Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4248 ¶ 27 (Rev. Bd. 1991) (subsequent history omitted) (statements in application and in depositions are not in evidence where applicant failed to introduce them into record evidence).

On 053088 [May 30, 1988] at 2251 [10:51 p.m.], I was dispatched to 2127 NW Elevenmile, on a check the welfare call. An unknown person from California called 911. This person said her son, a Mr. Freemon, called her. He said that he had taken some drugs. She wanted Police to check him to see if he was all right. Officer Ross and I arrived at 2258 [10:58 p.m.].

The address we were given was the Rockwood Gym. It was owned by Elehue Kawi Freemon.

The door to the building was unlocked. Officer Ross opened the door. He saw Freemon standing near a receptionist desk. Officer Ross found a Kitchen Knife next to Freemon's hand on the receptionist desk. Freemon appeared to be under the influence of a drug. The smell of an alcoholic beverage was emanating from his breath.

I asked Freemon if he took any pills. He said "Yes." I asked what kind. He said "Sleeping pills." I asked how many. He said "I don't remember."

Officer Ross searched the office area for a pill container. He found an empty Sleeping Pill box, Fred Meyer "Sleep Rite" brand, 72 tablets. The box was empty.

Officer Ross found a suicide letter on the desk in the office. The note said on the front: Who ever finds this please don't send to my parents. To Edna or Evelyn Freemon.

The note went on to say how he was sorry; the pressure was too much for me.

\*\*\*\*

An empty quart bottle of Sokol Blosser red wine was found in the office area.

Freemon would not tell me when he took the pills. He would not tell me how many pills he took.

Freemon did make several statements. He said "This won't go away." "My head is full and it won't forget." "I have to see Janee." (Janee is his girlfriend).

Freemon tried to be violent. However, he was unable to cause any harm due to the influence of the ingested pills. I handcuffed Freemon for our safety. Freemon was examined by Fire Rescue and Buck Ambulance EMT's. Freemon was transported to Portland Adventist Hospital. Freemon was placed on a Police Officer Mental Hold. Freemon was lodged at PA. Freemon was treated by PA Hospital doctors for the overdose of pills.

AT&T Exh. E at Attach. exh. 3 (police report appended to AT&T Answer) pp. 21-24 (parenthesis original).

19. The police supplemental report continued:

... The Subject was very wobbly on his feet .... The man was obviously well under the influence of other than alcohol .... I read the letter which was obviously left as a suicide note .... I could hear the Black male saying "my mind just won't stop working."

*Id.* at 25-26. The psychological report, prepared while Freemon was being treated at the Portland Adventist Medical Center, corroborated the police reports:

It was his [Freemon's] observation that he just wanted to get some sleep and he acknowledged that he decided he would just like to go to sleep forever, there is nothing to live for, he felt like everything was just going to pieces. He could not survive without Jan ....

\*\*\*

The patient is ... still a little unsteady when he gets up from lying down which undoubtedly relates to his recent dose of alcohol and Benadryl.

AT&T Exh. D at Attach. exh. 20 (release authorization and discharge summary appended to Freemon deposition) pp. 4, 5. In addition, in his deposition, Freemon admitted that he had consumed three glasses of wine and ingested a number of sleeping pills before making the call, Judge's Exh. 2 at 183, 189 (Freemon's deposition), which could impair his recollection of the circumstances of the call.

20. Finally, Freemon's exception that the ALJ should not have rejected Mr. Freemon's medical records compiled during his hospitalization because the records would have corroborated his testimony that there was no justification for the emergency call is without merit. The ALJ rejected Freemon's Exh. 4, which includes the medical records, because Freemon had not produced the records by the date the requested documents were to be made available to AT&T, Tr. 107-112, and AT&T did not in fact have the documents by the time it deposed Mr. Freemon. *Id.* The ALJ also noted that certain of the records required someone to verify the technical terms. Tr. 111-12. Even assuming the accuracy of the records, which include significant amounts of handwritten data on all phases of Freemon's stay at the medical facility, it is difficult to conceive how, without expert assistance, the ALJ or reviewing authorities could accurately assess Freemon's physical condition the night of the call by merely reviewing the records. The ALJ acted well within his discretion in rejecting Mr. Freemon's medical records. Moreover, aspects of Freemon's Exh. 4 contradict rather than support Freemon's testimony there was nothing physically or mentally amiss the evening of the call. For example, the hospital progress report on the day after Freemon's arrival recounts that Freemon stated he "always has a tendency to be suicidal" and that, although Freemon "continues to deny that episode precipitating admission was a suicide attempt ... in next statement says he can't make it [illegible] Jan and becomes very agitated." Freemon Exh. 4 at 10, 12.

21. In sum, contrasted with the police and hospital reports at the time of the incident, Ms. Zolnikov's earlier recollection of the call, Mrs. Freemon's denial of the facts recited in the complaint, and Mr. Sharpe's testimony concerning the technical impossibility of the facts occurring as stated in the complaint, the documents proffered by Freemon, even if admitted into evidence, are not sufficient to meet Freemon's burden of proof in establishing that AT&T violated Section 705 of the Communications Act or committed any violation that would entitle him, or his

mother, to any monetary damages.<sup>7</sup> It is quite evident that the episode was, and still is, traumatic for Mr. Freemon; however, there is no persuasive evidence supporting the violation alleged in the complaint.

22. ACCORDINGLY, IT IS ORDERED, That the Motion to correct Complainants *Findings of Fact*, issued January 29, 1995, filed March 13, 1995, by Elehue Kawika Freemon, IS DISMISSED; that the Requests for Participation, filed March 24, and resubmitted on March 27, 1995, respectively, by James D. Waide, Edna Roland, Elehue Freemon (father), and Evelyn Freemon, as supplemented on March 28, 1995 ARE DISMISSED; and that the motion for late filing, filed by Dr. Gisela Spieler on April 10, 1995 IS DISMISSED; and

23. IT IS FURTHER ORDERED, That the formal complaint (File No. E-90-393) filed by Elehue Kawika Freemon and Lucille K. Freemon IS DISMISSED with prejudice with respect to Lucille K. Freemon, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene  
Member, Review Board

<sup>7</sup> Our holding that there was no violation of Section 705 does not rest on the chapter 119 exception that an operator may intercept and disclose communications while engaged in any activity that is a necessary incident to the rendition of her service. The *HDO* expressly recited that, to the extent an inter-

pretation of the exception was required, the ALJ should forward to the General Counsel a request to solicit the views of the Department of Justice. 9 FCC Rcd at 4034 ¶ 10. It does not appear that any request was made in this case.